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ANN BAVENDER*
ANNE GOODWIN CRUMP*
VINCENT J. CURTIS, JR.
RICHARD J. ESTEVEZ
PAUL J. FELDMAN
ERIC FISHMAN
RICHARD HILDRETH
FRANK R. JAZZO
ANDREW S. KERSTING*
KATHRYN A. KLEIMAN
EUGENE M. LAWSON, JR.
HARRY C. MARTIN
J. TODD METCALF*
GEORGE PETRUTSAS
LEONARD R. RAISH
JAMES P. RILEY
KATHLEEN VICTORY
HOWARD M. WEISS
*NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW
11th FLOOR, 1300 NORTH 17th STREET
ROSSLYN, VIRGINIA 22209-3801

(703) 812-0400
TELECOPIER
(703) 812-0486
INTERNET
office@fhf-telcomlaw.com

FRANK U. FLETCHER
(1939-1985)
ROBERT L. HEALD
(1956-1983)
PAUL D. P. SPEARMAN
(1936-1982)
FRANK ROBERSON
(1938-1961)
RUSSELL ROWELL
(1948-1977)
RETIRED
EDWARD F. KENEHAN
CONSULTANT FOR INTERNATIONAL AND
INTERGOVERNMENTAL AFFAIRS
SHELDON J. KRYN
U.S. AMBASSADOR (ret.)
OF COUNSEL
EDWARD A. CAINE*
WRITER'S NUMBER
(703) 812-

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0474

May 22, 1997

BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

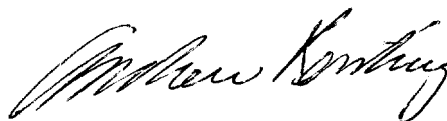
Re: Metro Broadcasters-Texas, Inc.
MM Docket No. 97-26; RM-8968
Detroit, Texas

Dear Mr. Caton:

Transmitted herewith on behalf of Metro Broadcasters-Texas, Inc., are an original and four copies of its "Reply to Opposition to Motion for Leave to File Supplemental Comments," filed in the above-referenced proceeding.

Should any question arise concerning this matter, please communicate directly with this office.

Very truly yours,



Andrew S. Kersting
Counsel for
Metro Broadcasters-Texas, Inc.

Enclosures
cc (w/ encl.): Certificate of Service

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BEFORE THE
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Federal Communications Commission
Office of Secretary

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 97-26
Table of Allotments,)	RM No. 8968
FM Broadcast Stations)	
(Detroit, Texas))	

To: Chief, Allocations Branch

**REPLY TO OPPOSITION TO MOTION FOR LEAVE
TO FILE SUPPLEMENTAL COMMENTS**

Metro Broadcasters-Texas, Inc. ("Metro"), licensee of Station KHYI(FM), Howe, Texas, by counsel, hereby replies to the "Opposition to Motion for Leave to File Supplemental Comments," filed May 15, 1997 ("Opposition"), by K95.5, Inc. ("K95.5") in the above-captioned proceeding. In reply, the following is stated:

I.
Procedural Background

On January 24, 1997, the Commission released a *Notice of Proposed Rule Making*, 12 FCC Rcd 1810 (Chief, Allocations Branch 1997) ("*NPRM*"), in the above-captioned proceeding proposing to amend the FM Table of Allotments by allotting Channel 294C2 to Detroit, Texas, as that community's first local transmission service. On March 17, 1997, Metro filed its "Comments and Counterproposal" ("Counterproposal") proposing, instead, (i) the allotment of either Channel 238C2, 238C3, or 238A to Detroit, (ii) the substitution of Channel 294C2 for Channel 238C2 at Hugo, Oklahoma, and (iii) the modification of the license for Station KHYI(FM), Howe, Texas, to specify operation on Channel 237C2 in lieu of Channel 237C3. After filing reply comments on April 1,

1997, Metro filed a Motion for Leave to File Supplemental Comments ("Motion") and accompanying supplemental comments on May 2, 1997, in order to clarify that it will reimburse K95.5, licensee of Station KITX(FM), Hugo, Oklahoma, for its reasonable and prudent costs associated with implementing the requested frequency change.

In its Opposition, K95.5 claims that because Metro's Counterproposal did not include a reimbursement commitment concerning the proposed substitution of Channel 294C2 for Channel 238C2 at Hugo, Metro's Counterproposal was "fatally deficient." Opposition, pp. 2-3. K95.5 therefore contends that the Commission should deny Metro's Motion and dismiss its Counterproposal because, if the Commission were to accept Metro's curative reimbursement commitment, K95.5 would be "greatly prejudiced by having to modify its existing operation of FM Station KITX on Channel 238C2 at Hugo, Oklahoma" *Id.* at 4.

II.

The Commission Should Grant Metro's Motion and Accept Its Curative Reimbursement Commitment

K95.5's request that the Commission deny Metro's Motion and dismiss its Counterproposal is not supported by Commission precedent. Although K95.5 cites several cases in support of its position, only two of these cases -- *Naples, Florida* and *Punxsutawney, Pennsylvania*¹ -- involved the failure to include a reimbursement pledge, and neither of these cases involved an attempt to cure the minor procedural deficiency by providing a late-filed reimbursement commitment. Moreover, in *Punxsutawney*, the Commission issued a "Request for Supplemental Information" in order to,

¹ See *Clewiston, Fort Myers Villa, et al., Florida*, 10 FCC Rcd 6548, ¶9 (Chief, Policy and Rules Div. 1995); *Brookville and Punxsutawney, Pennsylvania*, 3 FCC Rcd 5555 (Deputy Chief, Policy and Rules Div. 1988) ("Request for Supplemental Information").

inter alia, provide a party with the opportunity to clarify its reimbursement commitment. See *Punxsutawney, Pennsylvania*, 3 FCC Rcd at 5556.

The case which is directly on point, and which K95.5 failed to cite, is *Boalsburg, Clearfield, et al., Pennsylvania*, 7 FCC Rcd 7653 (Chief, Policy and Rules Div. 1992), *rev. dismissed*, 10 FCC Rcd 12264 (1995). In *Boalsburg*, the Commission permitted a counterproponent, who neglected to provide a reimbursement commitment in its counterproposal, to cure this minor deficiency by providing such a statement in its reply comments. In doing so, the Commission distinguished this situation from one where no attempt is made to provide a late-filed reimbursement pledge:

Although Pro Marketing failed to include a commitment to reimburse the licensees [of the affected stations] for their expenses in changing channels, this failure was cured by the inclusion of such a statement in Pro Marketing's reply comments. Brockway Broadcasters never filed a similar curative statement. While we require that all counterproposals be technically and procedurally correct when filed, . . . *we do not absolutely prohibit minor curative submissions*. . . . We see no reason to reject a counterproposal for failure to include a reimbursement commitment when that failure is cured and acceptance of the counterproposal would not require the denial of another proposal before us in the proceeding and no prejudice would result to the licensees entitled to reimbursement.

Id. at 7654, n.7 (emphasis added).²

Like the counterproponent in the *Boalsburg* proceeding, Metro has cured the minor deficiency in its Counterproposal by clarifying its intent to reimburse K95.5 for the reasonable and prudent costs it incurs in implementing the requested frequency change. Although Metro filed its curative reimbursement statement one month after the date for filing reply comments, Metro respectfully submits that its late-filed reimbursement pledge will not materially delay the resolution of this proceeding, nor will it prejudice any party hereto.

² Case citations have been omitted.

As demonstrated in Metro's Counterproposal and reply comments, acceptance of Metro's curative submission will not result in the denial of another proposal in this proceeding. Although Great Plains Radiocasting has proposed the allotment of Channel 294C2 to Detroit, Texas, Metro's Counterproposal demonstrates that Channel 238 can be allotted to Detroit in lieu of Channel 294C2 as either a Class C2, C3 or A facility, and will not conflict with Metro's proposed substitution of Channel 237C2 for Channel 237C3 at Howe, Texas. *See* Metro's Counterproposal, pp. 2-3. Indeed, Great Plains Radiocasting has not opposed Metro's curative submission.

Moreover, acceptance of Metro's curative submission will not deprive K95.5 of the allotment of an additional channel at Antlers, Oklahoma.³ As demonstrated in Metro's reply comments, in addition to the existing vacant allotment for Channel 284A at Antlers, there are two alternative channels available for allotment to Antlers (one of which is fully-spaced as a Class C2 facility) that will not conflict with either the proposal set forth in the *NPRM* or Metro's Counterproposal.⁴

Furthermore, acceptance of Metro's reimbursement commitment will not result in any cognizable prejudice to K95.5. K95.5 does not make *any* claim that acceptance of Metro's curative submission either would prejudice its substantive allotment proposal or cause it any greater harm than if the reimbursement commitment had been included in Metro's March 17, 1997, Counterproposal. Indeed, the only prejudice that K95.5 claims will result from acceptance of Metro's curative reimbursement commitment is that Station KITX will have to modify its existing

³ K95.5 filed a counterproposal in this proceeding on March 17, 1997, proposing the allotment of Channel 294C2 to Antlers, Oklahoma.

⁴ As demonstrated therein, Channels 222A, 262A, or 222C2 may be allotted to Antlers without conflicting with the proposals to allot a Class C2 facility at Detroit. *See* Metro's Reply Comments, pp. 2-4.

operation to operate on Channel 294C2, rather than its existing Channel 237C2. Opposition, p. 4. As demonstrated in Metro's reply comments (*see* pp. 2-4), K95.5 filed its counterproposal in this proceeding to avoid having KITX change channels. The vacant allotment for Channel 284A at Antlers has lain fallow for five years. If K95.5 had a good-faith intent to serve the Antlers community, it would have been much easier for K95.5 to file a construction permit application for the vacant Channel 284A allotment and receive a relatively quick grant of its first-come/first-serve application, rather than go through the cumbersome process of seeking the allotment of an additional channel to Antlers which conflicts with two separate proposals to allot a Class C2 facility to Detroit. K95.5's interest in avoiding having KITX change channels is not a cognizable interest under the Commission's FM allotment priorities,⁵ and should not preclude Metro's curative reimbursement commitment.⁶

In addition to the reasons set forth above, Metro respectfully submits that acceptance of its curative reimbursement commitment is in the public interest because of the substantial public interest benefits that will result from its proposal. Metro's alternative proposal to allot Channel

⁵ The FM allotment priorities are (1) first aural service, (2) second aural service, (3) first local service, and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *See Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

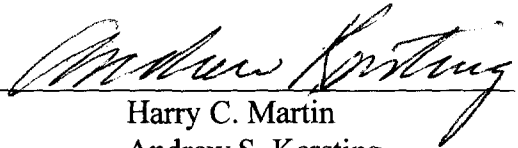
⁶ The fact K95.5 has foregone the opportunity of filing a first-come/first-serve application for the vacant Channel 284A allotment at Antlers for five years, and only now seeks to bring a new radio service to that community, strongly suggests that K95.5 also may have an anti-competitive motive for seeking the allotment of an additional channel to Antlers which would preclude the allotment of a Class C2 facility at Detroit. Hugo is located approximately 30 miles northwest of Detroit. *See Rand McNally Road Atlas*, p. 94 (1997). As demonstrated in the engineering exhibit attached to Metro's reply comments, there would be a substantial overlap of the city-grade contours of Station KITX and a Class C2 facility at Detroit operating with maximum facilities. *See Metro's Reply Comments*, pp. 4-5 and Engineering Statement, p. 2 and Figure 5 thereto.

238C2 to Detroit would bring a new service to a greater number of people in the Detroit area than the proposal set forth in the *NPRM*. Moreover, the proposed upgrade of Channel 237C3 to Channel 237C2 at Howe would enable Station KHYI to increase the population within its 1 mV/m (60 dBu) contour by 137,974 persons, and increase its coverage area by 3,630 square kilometers, without any loss area. *See* Metro's Counterproposal, pp. 3-4. For all of these reasons, Metro requests that the Commission accept its curative reimbursement commitment and resolve this proceeding through Metro's alternative proposals which should satisfy each of the proponents in this proceeding.

WHEREFORE, in light of the foregoing, Metro Broadcasters-Texas, Inc. respectfully requests that the Commission GRANT its motion for leave and ACCEPT its Supplemental Comments, GRANT its Counterproposal, AMEND the FM Table of Allotments in accordance therewith, and MODIFY the license of Station KHYI(FM), Howe, Texas, to specify operation on Channel 237C2 in lieu of Channel 237C3.

Respectfully submitted,

METRO BROADCASTERS-TEXAS, INC.

By: 
Harry C. Martin
Andrew S. Kersting

Its Counsel

Fletcher, Heald & Hildreth, P.L.C.
1300 North Seventeenth Street
11th Floor
Rosslyn, Virginia 22209
(703) 812-0400

May 22, 1997

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CERTIFICATE OF SERVICE

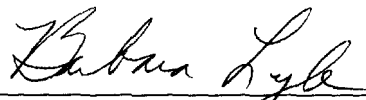
I, Barbara Lyle, a secretary in the law firm of Fletcher, Heald & Hildreth, P.L.C., hereby certify that on this 22nd day of May, 1997, copies of the foregoing "Reply to Opposition to Motion For Leave to File Supplemental Comments" were hand delivered or mailed first-class, postage prepaid, to the following:

John A. Karousos, Chief*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

Ms. Pam Blumenthal*
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W., Room 565
Washington, DC 20554

William J. Pennington, Esquire
P.O. Box 403
Westfield, Massachusetts 10186
Counsel for Great Plains Radiocasting

John F. Garziglia, Esquire
Pepper & Corazzini, L.L.P.
1776 K Street, N.W., Suite 200
Washington, DC 20006
Counsel for K95.5, Inc.



Barbara Lyle

* Hand Delivered